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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 PATRICK K. SPURLOCK,

11 Plaintiff,

12 v.

13 IAN A. NORTHRIP *et al.*,

14 Defendants,
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Case No. C09-5422RBL/JRC

REPORT AND
RECOMMENDATION

NOTED FOR:
September 25, 2009

17 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned
18 Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local
19 Magistrate Judges' Rules MJR 1, MJR 3, and MJR 4. Plaintiff brings this action challenging the
20 actions of a number of persons from his criminal case. In specific he challenges actions that
21 were taken by his defense counsel, two prosecuting attorneys, and unnamed police officers. This
22 Civil Rights action directly challenges the propriety of plaintiff's criminal conviction and
23 plaintiff seeks damages for the time he spent in prison. The Court Recommends this action be
24 dismissed. Defendant Ian A. Northrip would be DISMISSED WITH PREJUDICE, because
25 defense counsel does not act under color of state law. The claim regarding the propriety of the
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1 criminal conviction and the remaining defendants would be DISMISSED WITHOUT
2 PREJUDICE.

3 DISCUSSION

4 When a complaint fails to state a claim, or contains a complete defense to the action on
5 its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28
6 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing* Franklin v.
7 Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)). In order to state a claim under 42 U.S.C. § 1983,
8 a complaint must allege that (1) the conduct complained of was committed by a person acting
9 under color of state law and that (2) the conduct deprived a person of a right, privilege, or
10 immunity secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S.
11 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986). Section
12 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are
13 present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020
14 (1986).
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17 A defense attorney does not act under color of state law. *See* Polk County v. Dodson, 454
18 U.S. 312, 317-18 (1981). Ian A. Northrip, who was the attorney representing Plaintiff in a
19 criminal case, simply cannot be a proper defendant in a civil rights action. Mr. Northrip is
20 entitled to DISMISSAL prior to service as no amendment of the complaint could cure this defect.
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22 Further, this entire action challenges the propriety of Plaintiff's criminal conviction and
23 actions taken by state officials during Plaintiff's criminal trial. When a person confined by the
24 state is challenging the very fact or duration of his physical imprisonment, and the relief he seeks
25 will determine that he is or was entitled to immediate release or a speedier release from that
26 imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S.

1 475, 500 (1973). In June 1994, the United States Supreme Court held that "[e]ven a prisoner
2 who has fully exhausted available state remedies has no cause of action under § 1983 unless and
3 until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a
4 writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The court added:

5 Under our analysis the statute of limitations poses no difficulty while the state
6 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]
7 § 1983 cause of action for damages attributable to an unconstitutional conviction or
8 sentence does not accrue until the conviction or sentence has been invalidated.

9 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be
10 made based upon whether 'the nature of the challenge to the procedures [is] such as necessary to
11 imply the invalidity of the judgment.' *Id.* If the court concludes that the challenge would
12 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge
13 must be brought as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail,
14 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)).

15 Here, the complaint challenges the action of police in seeking a warrant, and the actions
16 taken by two prosecutors during trial. The proposed complaint is a challenge to Plaintiff's
17 conviction (Dkt. # 1, proposed complaint). The complaint fails to state a cause of action under 42
18 U.S.C. § 1983. This is not a defect that could be cured by amendment of the complaint. Because
19 the § 1983 claim against these defendants is premature, the Court recommends that the
20 remaining Defendants and causes of action should be DISMISSED WITHOUT PREJUDICE.

21 CONCLUSION

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23 Defendant Northrip is entitled to DISMISSAL WITH PREJUDICE from this action
24 because he cannot act under color of state law as a defense attorney in a criminal action. The
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1 remaining Defendants and claims should be DISMISSED WITHOUT PREJUDICE.

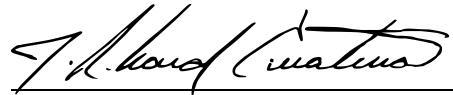
2 Amendment of the complaint cannot cure these defects.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Fed. R. Civ. P., the parties shall
4 have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.

5 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.

6 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the
7 clerk is directed to set the matter for consideration on September 25, 2009, as noted in the
8 caption.
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10 Dated this 17th day of August, 2009.

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14 J. Richard Creatura
15 United States Magistrate Judge
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